

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 16, 2003

ANTONIO L. SWEATT, PRO SE v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Davidson County
No. 90-S-1362 Steve Dozier, Judge**

No. M2002-02391-CCA-R3-CO - Filed September 30, 2003

Appellant, Antonio L. Sweatt, appeals from the trial court's order dismissing Appellant's Petitions for Writ of Error Coram Nobis and for DNA analysis pursuant to the "Post-Conviction DNA Analysis Act of 2001," Tenn. Code Ann. §§ 40-30-401 – 413. The trial court dismissed the petitions without an evidentiary hearing. Following a review of the entire record, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOE G. RILEY and ALAN E. GLENN, joined.

Antonio L. Sweatt, *Pro Se*, Wartburg, Tennessee, for the appellant.

Michael E. Moore, Solicitor General; Kim R. Helper, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Kathy Morante, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

According to the allegations in Appellant's verified petitions, he pled guilty on December 13, 1990, to two counts of aggravated rape. Approximately six months prior to the guilty pleas, a sample of Appellant's DNA was tested along with a sample from "the victim" (who is otherwise not identified). The results were "inconclusive." Appellant asserts in his pleadings that this result proves his innocence of the crimes to which he pled guilty. In his brief on appeal, he submits that the DNA test results were "negative."

Appellant argues that he is entitled to relief pursuant to a *writ of error coram nobis*, because this information is "newly discovered evidence," which he is without fault in failing to present prior to his guilty pleas. He also asserts that he should be granted the benefit of a new DNA test pursuant to the "Post-Conviction DNA Analysis Act of 2001." Tenn. Code Ann. §§ 40-30-401 – 413.

Appellant specifically appeals from the trial court's August 27, 2002, order, which provides as follows:

ORDER

The petitioner filed a Motion to Reconsider the Order of Dismissal on August 26, 2002. Recently, the petitioner in this cause filed a *pro se* Verified Amended Writ of Error Coram Nobis and/or Petition Requesting DNA Analysis on August 7, 2002. On May 1, 2002, the petitioner filed a *pro se* Petition to Re-open for DNA Analysis. This Court entered an order on May 14, 2002, denying the petitioner's prior request for DNA analysis. Further, this Court entered an order denying the petitioner's writ of error coram nobis on August 13, 2002. The Court's position has not changed since its previous three rulings.

The record is clear the evidence sought to be analyzed by the defendant was previously tested on June 15, 1990, and the results made known prior to the defendant knowingly and voluntarily entering his plea. If the results of the prior rape kit analysis were inconclusive, the defendant should not have entered his plea and demanded another examination. Further, the state's response to discovery indicates that defendant was positively identified by the victim minutes after the alleged offense occurred. The petitioner's averment that the Court has not addressed the merits of his claim is erroneous. The Court's initial order entered on May 14, 2002, addressed the merits of the petitioner's claim. Therefore, the Court is of the opinion that the defendant's Petition to Reopen Post-Conviction Petition should be overruled and denied.

The trial court's order of August 13, 2002, states:

ORDER

The Petitioner in this cause filed a *pro se* Verified Amended Writ of Error Coram Nobis and/or Petition Requesting DNA Analysis on August 7, 2002. On May 1, 2002, the petitioner filed a *pro se* Petition to Re-open for DNA Analysis. This Court entered an order on May 14, 2002, denying the petitioner's prior request for DNA analysis. The record is clear the evidence sought to be analyzed by the defendant was previously tested on June 15, 1990, and the results made known prior to the defendant knowingly and voluntarily entering his plea. The state's response to discovery indicates that the defendant was positively identified by the victim minutes after the alleged offense occurred. The petitioner's final contention alleges that he did not receive effective assistance of counsel before entering his plea. Any issues concerning effective assistance of counsel are time barred under a post-conviction procedure pursuant to T.C.A. § 40-30-202. Therefore, the Court is of the opinion that the defendant's Petition to Reopen Post-Conviction Petition should be overruled and denied.

The trial court's May 14, 2002, order is not included in the record in this appeal. The issue regarding the request for DNA analysis is waived because Appellant did not include the trial court's May 14, 2002, order in the appellate record. It is the duty of the appellant to provide a record which conveys a fair, accurate and complete account of what transpired with regard to the issues which form the basis of the appeal. Tenn. R. App. P. 24(b); *see State v. Wendell Ray Williams*, 2003 Tenn. Crim. App. LEXIS 312, No. M2001-02296-CCA-R3-CD (Tenn. Crim. App., filed at Nashville, April 4, 2003), *no perm. to app. filed*.

Even absent waiver, Appellant is not entitled to relief. In the case of a conviction for aggravated rape, the trial court *shall* order DNA analysis if all four requirements of Tenn. Code Ann. § 40-30-404 are met. The absence of any one of the four statutory criteria justifies dismissal of the petition. *See Mark A. Mitchell v. State*, 2003 Tenn. Crim. App. LEXIS 327, No. M2002-01500-CCA-R3-PC (Tenn. Crim. App., filed at Nashville, April 11, 2003), *perm. to appeal pending*.

Tenn. Code Ann. § 40-30-404 provides as follows:

40-30-404. Court order if probable that exculpatory results would not have resulted in prosecution or conviction. – After notice to the prosecution and an opportunity to respond, the court shall order DNA analysis if it finds:

- (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
- (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
- (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
- (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-404 (Supp. 2002).

According to Appellant's sworn petition, DNA analysis had already been done prior to his guilty pleas. He made no allegation that a new type of analysis could resolve an issue not resolved by the previous analysis. In these matters, the trial court "must be afforded considerable discretion Consequently, the scope of appellate review is limited." *Mitchell*, 2003 Tenn. Crim. App. LEXIS 327 at *12.

The statute of limitations for a petition for *writ of error coram nobis* is one year. Tenn. Code Ann. § 27-7-103 (2000). Appellant did not file his request for relief until almost twelve years after entering his pleas of guilty. He has not shown in his petition any grounds for relief that would justify the tolling of the statute of limitations. *See Workman v. State*, 41 S.W.3d 100 (Tenn. 2001); *State v. Ratliff*, 71 S.W.3d 291 (Tenn. Crim. App. 2001). Accordingly, Appellant is not entitled to relief on this issue.

CONCLUSION

The judgments of the trial court dismissing Appellant's Petition for Writ of Error Coram Nobis and for Post-Conviction DNA Analysis are affirmed.

THOMAS T. WOODALL, JUDGE